

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF NC

JUL 16 1993

J. BARON CROSHON

BY:

Case No. 91-10678

Chapter 11

In Re:

GOUGE TRUCKING CO., INC.

Debtor.

GOUGE TRUCKING CO., INC.

Plaintiff,

v.

SHERMAN BROTHERS, INC., and
HOWARD WAYNE RICHARDS,

Defendants.

Adversary Proceeding
No. 93-1078

JUDGMENT ENTERED ON

7-16-93

MEMORANDUM AND RECOMMENDATION

This matter is before the court on defendants' request for a jury trial in this proceeding. After a thorough examination of the record in this matter and the applicable case law and statutes, the court finds that defendants are entitled to a trial by jury and makes the following recommendation to the district court as stated below.

PROCEDURAL HISTORY

The debtor/plaintiff is a North Carolina trucking company that filed a voluntary Chapter 11 petition on December 6, 1991. The plaintiff initiated this adversary proceeding on February 22, 1993 seeking damages from the defendants relating to a collision involving defendant Sherman Brothers' truck, driven by defendant Richards, and plaintiff's utility trailer. Plaintiff alleges

that on September 23, 1992 Richards backed Sherman's truck into plaintiff's utility trailer causing severe damage to the trailer. While the defendants repaired the trailer, plaintiff claims that it suffered loss of use of the trailer in excess of \$30,000.00. The damages for the loss of use are the subject of this adversary proceeding. On April 23, 1993 the defendants filed a timely Answer which included a request for jury trial.

DISCUSSION

I. JURISDICTION

Before reaching defendants' request for a jury trial the court must first establish the basis for jurisdiction. The court concludes that, pursuant to the jurisdictional grant from the district court, it has jurisdiction over this adversary as a non-core, related proceeding.

The jurisdiction of the bankruptcy court is established pursuant to 28 U.S.C. §§ 157 and 1334. Section 1334 vests the district court with original and exclusive jurisdiction of all cases under Title 11 of the United States Code. In addition, the district court has original, but not exclusive jurisdiction over all civil proceedings "arising under Title 11, or arising in or related to cases under Title 11." 28 U.S.C. § 1334(b). The district courts are given the power in 28 U.S.C. § 157(a) to refer these jurisdictional grants to bankruptcy judges in their district. The judges of the United States District Court for the Western District of North Carolina entered a Referral Order on July 30, 1984, pursuant to the Bankruptcy Amendments and Federal

Judgeship Act of 1984 granting jurisdiction pursuant to § 1334 to the bankruptcy judges in this district.

The beginning of the jurisdictional analysis therefore begins with 28 U.S.C. § 1334. The court must determine whether the present civil proceeding is a case under Title 11, arising under Title 11, arising in Title 11 or is related to a case under Title 11. The court is persuaded by the well-reasoned opinion in Wood v. Wood (In re Wood), 825 F.2d 90 (1st Cir. 1987) for the analysis of jurisdiction. In Wood the court notes that the first category of proceedings merely refers to the bankruptcy petition itself, over which the district court and its bankruptcy courts have original and exclusive jurisdiction. Id. at 92. The remaining categories are set forth in 28 U.S.C. § 1334(b) which grants the district court original, but not exclusive jurisdiction over proceedings arising under, arising in and related to Title 11 cases. This language was taken verbatim from subsection 1471(b) of the 1978 Act. Thus, in absence of much legislative history for the 1984 addition of § 1334, the Wood court looked to the legislative history of the 1978 Act to interpret the scope of the jurisdictional grant.

Legislative history indicates that the phrase "arising under Title 11, or arising in or related to cases under Title 11" was meant, not to distinguish between different matters, but to identify collectively a broad range of matters subject to the bankruptcy jurisdiction of federal courts. Congress was concerned with the inefficiencies of piecemeal adjudication of matters affecting the administration of bankruptcies and intended to give federal courts the power to adjudicate all matters having an effect on the bankruptcy.

In re Wood, 825 F.2d at 92 (citations omitted). Not surprisingly, the jurisdictional grant has been interpreted by courts as quite broad. Id.; Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984); In re Salem Mortgage Co., 783 F.2d 626, 634 (6th Cir. 1986).

The Supreme Court's decision in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) did not change this interpretation. In Marathon, the court was concerned with the constitutionality of the placement of jurisdiction under § 1471(c) of the 1978 Act which conferred to the bankruptcy courts the power to exercise all the jurisdiction vested in the district courts pursuant to § 1471(b). Marathon involved an adversary proceeding brought on behalf of the debtor for a pre-petition breach of contract action. The Court held that the proceedings could not be adjudicated by the bankruptcy court. The Congressional response to Marathon resulted in the enactment of 28 U.S.C. § 157. Section 157 limits the extent of jurisdiction in the bankruptcy courts by creating a statutory distinction between core and non-core proceedings and restricting the power of bankruptcy court to adjudicate the latter. In re Wood, 825 F.2d at 93. Marathon did not restrict the scope of jurisdiction set forth in the 1978 Act or later in § 1334, but rather limited the placement of jurisdiction with the bankruptcy courts pursuant to § 157.

The distinction of whether a proceeding arises under, arises in or is related to a Title 11 case is not necessary for a

determination of the scope of jurisdiction. Rather, it is only necessary to determine whether the proceedings is at least related to the bankruptcy. In re Wood, 825 F.2d at 93. The term "related to" is not defined; however, courts have offered various definitions. The definition that seems most accurate and consistent with the legislative history is "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." Id. at 93 (and cases cited therein).

As broad as this definition purports to be, there is a line of cases which suggest that there are some matters that are so remotely tangential to the bankruptcy proceeding as to not even be conceivably related to the administration of the estate. Cases that are most similar to the present adversary concern a cause of action that arose after the bankruptcy, and are therefore, not related to the bankruptcy case since the suits would benefit the debtor, and not estate. In Bobroff v. Continental Bank (In re Bobroff), 766 F.2d 797, 802-03. (3rd. Cir. 1985), the court ruled that a tort action for tortious interference with contract and defamation which arose after the bankruptcy filing was not property of the estate and therefore was not related to the debtor's bankruptcy case. In Ritter v. Pendergrass (In re Ritter), 46 B.R. 183, 186 (Bankr. E.D. Pa. 1985), a chapter 11, the court found that the mere possibility that the debtor might receive a commission, as administratrix of an estate, for prevailing in an adversary proceeding was an insufficient link to

the reorganization proceeding on which to predicate jurisdiction. The debtor's right to the commissions would be considered a post-petition cause of action, as the debtor instituted the adversary on behalf of the beneficiary after filing. The debtor argued that the commissions would benefit her bankruptcy estate by increasing the pool of money that she could use to pay her creditors. Both of these cases illustrate situations where the timing and the nature of a suit can remove it from bankruptcy jurisdiction.

Applying the definition of "related to" to the present proceeding, the court concludes that the claims involved are sufficiently related to Gouge Trucking's bankruptcy case to support a finding of jurisdiction. The outcome of this adversary will impact the estate with the possibility of receiving funds. The adversary seeks the recovery of damages due to loss of use from an income producing asset of the estate. The accident, and consequently, the alleged losses, occurred prior to confirmation and will affect the debtor's reorganization. The cases cited above where jurisdiction was found lacking are distinguishable. In re Bobroff was a Chapter 7. Unlike a Chapter 11, where there are on-going operations of the debtor-in-possession that affect the estate, in a Chapter 7, the estate is simply being liquidated -- it is understandable that there was no conceivable effect on the administration of the estate. The suit in In re Bobroff could not effect the liquidation of estate assets because the action was not property of the estate. In In re Ritter the

potential commissions seem completely unrelated to the debtor's business operations (if any) nor did they affect any property of the debtor's estate. Here, the suit concerns an income-producing assets of the estate. The court considers the present adversary as posing a conceivable effect on the administration of the bankruptcy estate. Thus, this case is related to the bankruptcy case and provides a basis for the bankruptcy court's jurisdiction.

II. THE EXTENT OF JURISDICTION -- CORE V. NON-CORE

The placement of jurisdiction in the bankruptcy courts under § 1471(c) of the 1978 Act was curtailed by the Supreme Court's decision in Marathon. Congress enacted 28 U.S.C. § 157 in response to Marathon, which differentiates between proceedings as "core" and "non-core". Under 28 U.S.C. § 157(b)(1) if the matter is core, the bankruptcy judge may enter final judgments. If the matter is not core, but related to a case under Title 11, 28 U.S.C. § 157(c)(1) requires the bankruptcy judge to submit proposed findings of fact and conclusions of law to the district court for entry of final judgment.¹ The precise language of the statutes reveals that core matters are only those proceedings that arise under Title 11 or that arise in a case under Title 11; they do not include merely related to proceedings.² Thus, the

¹ This provision is waivable by the parties under subsection 157(c)(2).

² 28 U.S.C. § 157(b)(1):

Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings

distinguishable categories of jurisdiction under 28 U.S.C. § 1334(b) now become more important. The exclusion of mere related to proceedings from the more general grant of jurisdiction was the effect of Marathon. The "Marathon-type" proceedings would therefore be considered "non-core", but nevertheless, "related to" under § 157(c). See, Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.), 815 F.2d 165, 168-69 (1st Cir. 1987) (discussing the legislative history of 28 U.S.C. § 157).

Section 157(b)(2) provides a non-exclusive list of proceedings which are deemed to be core. Some of the categories are very broad and have led courts to expand the definition of core matters beyond the constitutional dictates of Marathon. See, 1 Collier on Bankruptcy ¶ 3.01[2][b][iii] at 3-43, -44 (15th ed. 1991) (and cases cited therein). In In re Wood the court defined core proceedings as follows:

a proceeding is core under section 157 if it invokes a substantive right provided by Title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.

In re Wood, 825 F.2d at 97 (discussed fully, pp. 94-97).

There are some cases that adhere to a arguably more expansive definition for core proceedings. In In re Arnold Print Works, 815 F.2d 165, (1st Cir. 1987) the court held that the chapter 11 debtor's suit on the breach of a post-petition con-

arising under title 11, or arising in a case under title 11, referred under subsection (a) of the section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

tract was core. In the debtor's efforts to liquidate some estate assets, it entered into a contract with a third party to buy certain equipment. The buyer then refused to pay the full purchase price of the contract claiming that the debtor had misrepresented the quality of the equipment. Id. at 167.

Although the suit was purely a state law action that could exist outside the bankruptcy, the court found that it was core pursuant to at least two categories in 28 U.S.C. § 157(b): § 157(b)(2)(A), "matters concerning the administration of the estate," and § 157(b)(2)(O), "other proceedings affecting the liquidation of the assets of the estate." Id. at 168.

Similarly, in Ben Cooper, Inc. v. Ins. Co. of State of Pennsylvania (In re Ben Cooper, Inc.), 896 F.2d 1394, 1400; *vacated and remanded*, 111 S.Ct. 425 (1990); *reinstated*, 924 F.2d 36, *cert. denied*, 111 S.Ct. 2041 (1991) the court held that the bankruptcy court had core jurisdiction over a suit for breach of a post-petition contract for insurance. Pursuant to the debtor's chapter 11 plan, the debtor was required to obtain and maintain adequate insurance on certain property of the estate. The debtor did procure insurance and the resulting adversary was brought by the debtor against the insurance company to recover on a claim for fire loss that occurred post-petition. Id. at 1396-97. The court cited with approval In re Arnold Print Works and concluded that this was a core proceedings pursuant to 28 U.S.C.

§ 157(b)(2)(A) as a matter involving the administration of the estate. Ben Cooper, 896 F.2d at 1400. The court addressed the

definition of core proceedings put forth in In re Wood, and declined to follow it to the extent that "the timing of a dispute may render it [the proceeding] uniquely a bankruptcy case." Ben Cooper, 896 F.2d at 1400.

In its Complaint, plaintiff avers that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E). Subpart (E) delineates that "orders to turn over property of the estate" are considered core proceedings. The court rejects plaintiff's categorization of the matter as core. To accept plaintiff's categorization of the adversary as a core proceeding would be to eradicate the Supreme Court's limitation of bankruptcy court jurisdiction in Marathon. See, 1 Collier on Bankruptcy ¶ 3.10[2][b][iii] at 3-43, 44. A similar argument was made in Beard v. Braunstein, 914 F.2d 434, 444 (3rd Cir. 1990) in which the plaintiff argued that a suit for the pre- and post-petition breach of a rental contract constituted a core proceeding as an order to turn over property of the estate. The Court in Beard rejected the plaintiff's argument stating that "[s]uch an action [for turn over] is limited to property in the actual or constructive possession of the bankruptcy court." Id. A suit for damages, even where the plaintiff's rights seem clear, does not amount to constructive possession of the potential recovery. Under plaintiff's definition every action brought on behalf of the Trustee or debtor-in-possession to recover money or property could be considered a core proceeding. The court refuses to expand the definition of core proceedings in this manner.

With respect to the definition of core proceedings in In re Wood the court considers that definition to be generally correct, nevertheless, the court recognizes that there might be some cases, such as those presented in In re Arnold Print Works and Ben Cooper where that definition would have to be expanded. After considering the relevant cases, the statutes and the legislative history for 28 U.S.C. § 157, the court concludes that the present adversary is not a core matter. The present case does not invoke a substantive right provided by Title 11. The adversary is essentially a state law negligence action that would exist outside the context of the bankruptcy. As in In re Wood, the court recognizes that the existence of state law issues alone is not dispositive this court's ruling. 28 U.S.C. § 157(b)(3) ("A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law"). This court considers the cases that hold that suits for the breach of a post-petition contract are core matters distinguishable. The obvious distinction is that the present action is not for breach of contract, the present action is a claim in tort. However, the court does not see this factor as significant to the issues involved. The suit in In re Arnold Print Works did involve the administration of the estate in that it was a sale of estate assets in pursuit of the debtor's plan of reorganization. In the present case, the suit affects the debtor's reorganization, but it is not in pursuit of the debtor's reorganization or the administration of the estate.

This court is also not in disagreement with the holding in Ben Cooper. The suit there did involve the administration of the estate; the actions giving rise to the suit were contemplated and required by the chapter 11 plan. The court considers the present adversary a non-core matter; thus, the bankruptcy court is precluded from issuing a final judgment in this proceeding.

III. RIGHT TO JURY TRIAL

In their Answer, defendants raised their right that this proceeding be determined by a jury trial. The court has concluded that the defendants do have a right to a trial by jury in this proceeding. The seminal Supreme Court decision in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) is the guiding law for determining a party's right to jury trial in the bankruptcy courts. In that case, the Court held that the classification of a matter as core under the Bankruptcy Code does not usurp a party's Seventh Amendment right to jury trial and does not place "exclusive jurisdiction in an administrative agency or specialized court of equity." Id. at 2800. Therefore, the focus is on the underlying nature of the claims asserted in the proceeding and not the categorization of the claims as core or non-core. Nevertheless, the classification of the proceedings as non-core does impact the court's decision with respect to the proper tribunal for the jury trial.

Granfinanciera requires the court to engage in a three-part analysis to determine whether the defendants are entitled to a jury trial.

'First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.' The second stage of the analysis is more important than the first. If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a factfinder.

492 U.S. at 42 (citations omitted). Although this is the correct procedure, the court does not deem it necessary to engage in a long analysis. The remedy sought in this case, a money judgment, is clearly an action at law. Id. at 47-49, Pernell v. Southall Realty, 416 U.S. 363, 370 (1974). The action in the present case is based on negligence. "It is difficult to imagine a claim that is more inherently legal. . . . The conclusion that 'in an ordinary tort action . . . the right of trial by jury is guaranteed by the Constitution,' United States v. Fotopulos, 180 F.2d 631, 634 (9th Cir. 1950), is so obvious that it hardly needs belaboring." Ben Cooper, 896 F.2d 1394, 1402. Accordingly, the court concludes that the defendants are entitled to a jury trial in this matter.

IV. PROPER COURT TO CONDUCT JURY TRIAL

After establishing that defendants are entitled to have their jury trial request granted, this court must now determine whether any statutory or constitutional authority prevents the bankruptcy court from presiding over such a trial. 28 U.S.C. § 1411 provides in pertinent part:

[T]his chapter and Title 11 do not affect any right to trial by jury that an individual has under applicable

nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

28 U.S.C. § 1411(a). However, this statute does not provide insight into the inquiry confronting this court.

While there is authority from case law that bankruptcy courts can hold jury trials in core matters³, there are Circuit Court decisions that disagree. See, e.g., In re United Missouri Bank of Kansas City, N.A., 901 F.2d 1449 (8th Cir. 1990); In re Kaiser Steel Corp., 911 F.2d 380 (10th Cir. 1990). Thus, uncertainty abounds in the Circuits on the bankruptcy court's authority to conduct jury trials in core proceedings. There are even more stringent views on this issue pertaining to "related to" cases. Beard v. Braunstein, 914 F.2d 434 (3d Cir. 1990) (non-core related proceeding for recovery of pre-petition and post-petition rents could not be tried by bankruptcy court); Taxel v. Electronic Sports Research (In re Cinematronics, Inc.), 916 F.2d 1444 (9th Cir. 1990) (non-core related proceeding by non-debtor, against principal shareholder and president of debtor for breach of contract, breach of fiduciary duty and various fraud could not be tried by bankruptcy court).

Another factor to take into account is whether the parties consent to the bankruptcy court holding the jury trial. In this

³ Cooper v. Insur. Co. of the State of Pennsylvania, (In re Ben Cooper), 896 F.2d 1394 (2d Cir. 1990); In re Interbank Mortgage Corp., 128 B.R. 269 (N.D.Cal. 1991); In re Clairmont Transfer Co., 117 B.R. 288 (Bankr. W.D. Mich. 1990); In re Lee Way Holding Co., 115 B.R. 586 (S.D. Ohio 1990); In re Geauga Trenching Corp., 110 B.R. 638 (Bankr. E.D.N.Y. 1990); Gibson, "Jury Trials in Bankruptcy; Obeying the Commands of Article III and the Seventh Amendment," 72 Minn. L. Rev. 967, 1027-34.

case, consent is lacking because the defendants have requested that this court abstain and have not filed a proof of claim in the case.

Usually, if the proceeding is non-core, the bankruptcy judge is not permitted to "hear and determine" the case unless the parties consent to the court's jurisdiction under 28 U.S.C.

§ 157(c)(2). If the parties do not consent, as in this case, the bankruptcy judge's authority under section 157(c)(1) is merely to "submit proposed findings of fact and conclusions of law to the district court" with the understanding that the judgment will be entered by the district judge after considering those findings and conclusions.

Section 157(c)(1) requires de novo review by the district court of non-core matters. The Seventh Amendment specifies that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. Amend. VII. Thus, the two requirements are in conflict. Had this been a core proceeding the District Court would be limited to the analogous review that courts of appeals have over district courts and that would not conflict with the Seventh Amendment's prohibition against reexamination of facts found by a jury.

As the present adversary is a non-core, related matter, the court concludes that it would be unconstitutional for the bankruptcy court to conduct the jury trial.

CONCLUSION

Based on the foregoing reasons, the bankruptcy court recommends to the District Court that District Court conduct the jury trial, thus affording defendants their Seventh Amendment right. Additionally, this court recommends that the District Court modify its motion to withdraw reference to allow this court to preside over all pre-trial proceedings including the final pre-trial conference. Further, this court recommends that, following the final pre-trial conference, the district court calendar the trial of this case for its next scheduled civil term. If there is a change in the parties' positions so that both parties consent to the bankruptcy court conducting the jury trial, then this court shall conduct said trial.

This the 15th day of July, 1993.

George R. Hodges

George R. Hodges
United States Bankruptcy Judge

CERTIFIED TO BE A TRUE AND
CORRECT COPY OF THE ORIGINAL:
U. S. BANKRUPTCY COURT

WESTERN DISTRICT OF N.C.

BY:

Devin Ward
Deputy Clerk

DATE:

JUL 16 1993
JUDGMENT ENTERED ON: JUL 16 1993

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF NC

JUL 16 1993

J. BARON GOSHON
BY: *am*

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SHERMAN BROTHERS, INC., and
HOWARD WAYNE RICHARDS,

Defendants.

Adversary Proceeding
No. 93-1078

JUDGMENT ENTERED ON

7-16-93

ORDER DENYING DEFENDANTS' MOTION FOR ABSTENTION

This matter is before the court on defendants' motion for abstention. On May 19, 1993 the court heard oral arguments on the defendants' motion and at the conclusion of the hearing, the court took the matter under advisement. After carefully considering the arguments of counsel and the appropriate statutes and case law, the court is of the opinion that the defendants' motion should be denied.

PROCEDURAL HISTORY

The debtor/plaintiff is a North Carolina trucking company that filed a voluntary Chapter 11 petition on December 6, 1991. The plaintiff initiated this adversary proceeding on February 22, 1993 seeking damages from the defendants relating to a collision involving defendant Sherman Brothers' truck, driven by defendant

Richards, and plaintiff's utility trailer. Plaintiff alleges that Richards backed Sherman's truck into plaintiff's utility trailer causing severe damage to the trailer. While the defendants repaired the trailer, plaintiff claims that it suffered loss of use of the trailer in excess of \$30,000.00. The damages for the loss of use are the subject of this adversary proceeding. On April 23, 1993 the defendants filed a timely Answer and also filed the present Motion for Abstention.

DISCUSSION

Defendants seek abstention pursuant to 28 U.S.C. § 1334. Section 1334 is the federal statute that gives federal district courts exclusive jurisdiction of bankruptcy cases. There are two grounds for abstention; mandatory and permissive. We will address mandatory abstention first.

A. Mandatory Abstention -- § 1334(c)(2).

This court must abstain from exercising jurisdiction if several criteria are met: 1) a timely motion is made; 2) the civil action is purely a state law question; 3) the action is a non-core proceeding (28 U.S.C. § 157(c)(1)); 4) absent § 1334(b), the civil action could not have been commenced in federal court; 5) the action is commenced in a state court; and 6) the state court action may be timely adjudicated. 28 U.S.C. § 1334(c)(2). The court accepts for purposes of this Order that the first four criteria are met; however, the court bases its denial of the request for abstention on the fifth and sixth criteria.

There is some disparity among the courts as to whether the state court action must have been commenced prior to the bankruptcy petition. 1 Collier on Bankruptcy, ¶ 3.01[3][b] at 3-78; Container Transport, Inc. v. Scott Paper Co. (In re Container Transport Inc.), 86 B.R. 804 (E.D. Pa. 1988) (state court action must have been commenced prior to bankruptcy filing); World Solar Corp. v. Steinbaum (In re World Solar Corp.), 81 B.R. 603 (Bankr. S.D. Ca. 1988) (state court action must be filed on a timely basis in state court). This court does not take the position that the action must have been filed in state court prior to bankruptcy to warrant mandatory abstention, nevertheless, the court is influenced by the fact that the adversary was commenced by the debtor after filing, in this court. Had the civil action been commenced in state court prior to bankruptcy this court would have to consider the possibility of overlapping costs and time delay associated with retention of jurisdiction in the bankruptcy court. Because the action is not pending in state court the more influential factor to consider is the potential for timely adjudication in the state court.

The resolution of this adversary is important to the debtor's continuing success of its reorganization, such that the timely adjudication of the matter is accorded great weight in the court's decision. The court is confident that retention of jurisdiction would produce a more speedy resolution of the adversary than would result from sending the case to the state court of California. The defendants' request for a jury trial complicates the court's analysis of timely adjudication. In accordance with a Memorandum

and Recommendation filed contemporaneously with this Order the court has concluded defendants are entitled to a jury trial and that the District Court is the proper tribunal for the trial. Thus, it is the District Court's docket that is at issue. The bankruptcy court is prepared to conduct all pretrial matters concerning the adversary up until the very event of trial. The court is confident that this procedure will result in a more timely adjudication of the case than could be accomplished in state court. Based on the foregoing, the court concludes that mandatory abstention is not required in this instance.

B. Permissive Abstention -- § 1334(c)(1).

When mandatory abstention is not required a party may request that the court nevertheless abstain from hearing the case pursuant to 28 U.S.C. § 1334(c)(1):

Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11.

While the statute specifically states that a district court may abstain from hearing a matter, abstention "is the exception to the rule that federal courts should hear and decide matters properly before them." Ronix Corp. v. City of Philadelphia, 82 B.R. 19, 20 (E.D. Pa. 1988).

Under bankruptcy law, the presence of a state law issue is not enough to warrant permissive abstention, but it is a significant consideration. In re L & S Industries, Inc., 1993 WL 82774 (7th Cir. Ill.). In In re Tucson Estates, Inc., 912 F.2d 1162, 1166

(9th Cir. 1990) the Ninth Circuit identified twelve factors that courts should consider when deciding whether to abstain under § 1334(c)(1). These factors are:

- 1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention,
- 2) the extent to which state law issues predominate over bankruptcy issues,
- 3) the difficulty or unsettled nature of the applicable law,
- 4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
- 5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
- 6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
- 7) the substance rather than form of an asserted core proceeding,
- 8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
- 9) the burden of [the bankruptcy court's] docket,
- 10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,
- 11) the existence of a right to a jury trial, and
- 12) the presence in the proceeding of non-debtor parties.

The resolution of this claim against defendants will have a significant impact on the success of the debtor's reorganization. It is in the best interest of the estate that this matter be tried as promptly and expeditiously as possible.

The non-core nature of this proceeding coupled with the fact that defendants appear to be entitled to jury trial are factors that weigh in favor of granting discretionary abstention. However, upon examination of the totality of Tucson factors, the court finds that more substantial factors weigh heavily against abstention.

As noted earlier, this court is of the opinion that retention of jurisdiction will result in more timely adjudication and administration of the estate.

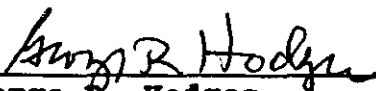
Although the issues appear to be limited to state law, they are not complex or unsettled. In a case involving a Chapter 11 debtor who brought an adversary proceeding seeking to collect an alleged account receivable, the bankruptcy court ruled that discretionary abstention was not justified where the suit required application of well-established state law. In re Mec Steel Buildings, Inc., 136 B.R. 606 (Bankr. D. Puerto Rico 1992).

In addition, there is no pending proceeding in state court. The debtor is a North Carolina corporation with its primary operations in North Carolina. There is no evidence that the debtor engaged in forum shopping for the purpose of bringing this lawsuit.

The analysis of the Tucson factors indicates that discretionary abstention is not required and the court concludes that defendants' motion for abstention should be denied.

It is therefore ORDERED that defendants' motion for abstention is hereby DENIED.

This the 15th day of July, 1993.


George R. Hodges
United States Bankruptcy Judge